Filed 11/3/17 P. v. Shackelford CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY BRENT SHACKELFORD, Defendant and Appellant.	F072964 (Super. Ct. No. F14907197) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Jane Cardoza, Judge.

Jyoti Malik, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Franson, J. and Peña, J.

A jury convicted appellant Jeffrey Brent Shackelford of transportation for sale of methamphetamine (Health & Saf. Code, § 11379, subd. (a)/count 1), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), a lesser included offense of the possession for sale offense charged in count 2, possession of a firearm by a felon (Pen. Code,[1] § 29800, subd. (a)(1)/count 3), and carrying a concealed firearm in a vehicle (§ 25400, subd. (a)(1)/count 4). On December 1, 2015, the court sentenced Shackelford to a prison term of three years consisting of the middle term of three years on count 1, time served on count 2, and concurrent two-year terms on each of his convictions in counts 3 and 4.

On July 29, 2016, Shackelford's appellate counsel filed a brief requesting that we review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Shackelford has not responded to this court's invitation to submit additional briefing.

On May 18, 2017, we issued a letter informing the parties that they could file a brief addressing whether the court imposed an unauthorized sentence by its failure to impose: (1) a stayed term on one of Shackelford's convictions in counts 3 and 4; and (2) laboratory fees and corresponding assessments on Shackelford's convictions in counts 1 and 2.

On June 1, 2017, Shackelford's appellate counsel filed a letter brief. Following independent review of the record and having considered the response by Shackelford's appellate counsel, we conclude that the court imposed an unauthorized sentence by its failure to: (1) stay one of the terms it imposed on Shackelford's convictions in counts 3 and 4; (2) impose laboratory fees and corresponding assessments on his convictions in counts 1 and 2; and (3) stay one of these fees and corresponding assessments. We also modify the judgment accordingly and affirm as modified.

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1 All further statutory references are to the Penal Code unless otherwise noted.

FACTUAL AND PROCEDURAL HISTORY

On July 5, 2014, at approximately 11:32 p.m., Fresno Police Officer Miguel Archan was on patrol when he noticed a large truck without a front license plate, which was a violation of Vehicle Code section 5200. The truck was being driven by Shackelford with an elderly man in his 70's in the front passenger's seat. Archan stopped the vehicle and informed Shackelford of the reason for the stop. Archan conducted a license and warrant check and discovered that Shackelford had an outstanding warrant. The officer had Shackelford step out of the truck, handcuffed him, and placed him in the back of his patrol car. The passenger was then asked to step out while Archan conducted an inventory check because the truck was going to be impounded. When Archan opened the center console, he noticed a large baggie containing a crystal substance that was later determined to be methamphetamine with a net weight of 27.86 grams. He continued to search and found a baggie that contained a scale with white residue and 32 pills that were later determined to be Vicodin. The officer also located marijuana in the center console.

Archan then searched the back part of the truck. Behind the driver's seat he found a .22-caliber Ruger handgun in a green bag. The green bag and another bag in the backseat area were full of watches, gold chains, copper jewelry, and cellphones. During a search of Shackelford, Archan found $600 in his wallet. The officer arrested Shackelford and let the passenger go.

On January 28, 2015, the Fresno County District Attorney filed an information in this matter.

On October 27, 2015, the jury rendered its verdict.

On December 1, 2015, the court sentenced Shackelford to a three-year prison term as previously noted. However, the court did not impose a laboratory fee or any corresponding assessments on his drug convictions in counts 1 and 2.

The Concurrent Terms Imposed on Counts 3 and 4

Shackelford contends the court should have stayed one of the terms imposed on count 3 or 4 and we agree.

Section 654, subdivision (a), in pertinent part, provides:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

" 'It has long been established that the imposition of concurrent sentences is precluded by section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.' [Citation.] Instead, the accepted 'procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.' " (*People v. Jones* (2012) 54 Cal.4th 350, 353 (*Jones*).)

In *Jones*, the court held that section 654 prohibits multiple punishment for a single physical act that violates different provisions of law. (*Jones, supra,* 54 Cal.4th at p. 358.) Shackelford's convictions in count 3 for being a felon in possession of firearm and in count 4 for possession of a concealed weapon were based on his singular possession of the handgun found in his truck. Thus, the court violated section 654 when it imposed concurrent terms on his convictions in each of those counts and we will stay the term imposed on count 4.

The Laboratory Fees and Assessments

Shackelford concedes the court should have imposed a $50 laboratory fee on each of his drug convictions in counts 1 and 2. However, he contends that because the laboratory fee does not constitute punishment, the court should not have imposed penalty assessments on either laboratory fee. We conclude that the laboratory fee and the assessments constitute punishment, that the court should have imposed them on each of

his convictions in counts 1 and 2, and that it should have stayed the fee and assessments imposed on one of those counts.

Health and Safety Code section 11372.5, subdivision (a) imposes a "criminal laboratory analysis fee" on defendants who are convicted of enumerated drug offenses, including violations of Health and Safety Code sections 11377 and 11379. The sentencing court is to "increase the total fine necessary to include this increment." (*Ibid.*) A "fine" not in excess of $50 is imposed, which is deposited into a "criminalistics laboratories fund" for every conviction of certain enumerated drug offenses. (*Id.* at subds. (a) & (b).)

There is a conflict of authority regarding whether the criminal laboratory analysis fee under Health and Safety Code section 11372.5 constitutes punishment and thus is subject to penalty assessments. In *People v. Watts* (2016) 2 Cal.App.5th 223 (*Watts*), the First Appellate District, Division One, held that the $50 assessment imposed pursuant to Health and Safety Code section 11372.5 is a fee, not a fine, penalty or forfeiture, and thus not subject to penalty assessments. (*Watts*, at pp. 229, 237.) In *People v. Vega* (2005) 130 Cal.App.4th 183 (*Vega*), the Second Appellate District, Division Seven, concluded that because this fee did not qualify as "punishment" within the meaning of section 182, subdivision (a), the fee was improperly imposed upon the defendants in that case who were convicted of conspiracy to transport cocaine. (*Vega*, at pp. 185, 194-195.)

In contrast, in *People v. Sharret* (2011) 191 Cal.App.4th 859 (*Sharret*), the Second Appellate District, Division Five, concluded that this same fee constituted punishment. (*Id.* at p. 869.) We agree with *Sharret* that the fee under Health and Safety Code section 11372.5 constitutes punishment.

As *Sharret* analyzed and determined, the language of Health and Safety Code section 11372.5 provides that the laboratory analysis fee is punitive in nature because a sentencing court is to increase the total fine in increments as necessary for each separate

offense. (*Sharret, supra,* 191 Cal.App.4th at pp. 869-870.) The fee may only be imposed upon a criminal conviction and it has no application in a civil context. (*Id.* at p. 870.) The fee is assessed in proportion to a defendant's culpability. The fee is mandatory and without an "ability to pay requirement." The fees are used for law enforcement purposes, and "earmarked for the criminalistics laboratories fund, which has no civil purpose." (*Ibid.*) There is no evidence Health and Safety Code section 11372.5 "was a mere budget measure" like other statutory fees. (*Sharret,* at p. 870.)

In *Vega,* the appellate court acknowledged that "[a] cogent argument can be made from the language of Health and Safety Code section 11372.5, subdivision (a) [that] the Legislature intended the $50 laboratory 'fee' to be an additional punishment for conviction of one of the enumerated felonies." (*Vega, supra,* 130 Cal.App.4th at p. 194.) This is because the statute refers to the "fee" as a "fine" which may be imposed in increments reflecting the number of offenses committed in addition to any other "penalty" prescribed by law. (*Ibid.*; Health & Saf. Code, § 11372.5, subd. (a).)

Vega found support for this interpretation from *People v. Talibdeen* (2002) 27 Cal.4th 1151 (*Talibdeen*), in which our Supreme Court held the penalty assessments applicable to " 'every fine, penalty, or forfeiture' " applied to the laboratory analysis fee in Health and Safety Code section 11372.5. (*Talibdeen,* at pp. 1153-1154.) However, *Vega* found *Talibdeen* not controlling because the Supreme Court assumed (along with the parties in that case) that the laboratory analysis fee was a punishment and *Talibdeen* did not analyze that issue. (*Vega, supra,* 130 Cal.App.4th at p. 195.)

The *Vega* court found the labels "fee" or "fine" not a dispositive indicator of an intent to be punitive, particularly when the Legislature used both terms in the same statute. (*Vega, supra,* 130 Cal.App.4th at p. 195.) "Fines are imposed for retribution and deterrence; fees are imposed to defray administrative costs." (*Ibid.*) *Vega* held "the main purpose of Health and Safety Code section 11372.5 is not to exact retribution against

drug dealers or to deter drug dealing … but rather to offset the administrative cost of testing the purported drugs the defendant transported or possessed for sale in order to secure his conviction." (*Ibid.*) "The legislative description of the charge as a 'laboratory *analysis* fee' strongly supports our conclusion, as does the fact the charge is a flat amount, it does not slide up or down depending on the seriousness of the crime, and the proceeds from the fee must be deposited into a special 'criminalistics laboratories fund' maintained in each county by the county treasurer." (*Ibid.*)

The first paragraph of Health and Safety Code section 11372.5, subdivision (a) characterizes the $50 assessment it authorizes as a "fee." *Watts* found this characterization controlling. In doing so, the court interpreted the second paragraph of this subdivision as "establish[ing] that in the case of an offense 'for which a fine is not authorized by other provisions of law,' the crime-lab fee acts as a fine and is, in turn, subject to penalty assessments." (*Watts*, *supra*, 2 Cal.App.5th at p. 235.) However, it also found that the most reasonable interpretation of the phrase "not authorized by other provisions of law" was that it referred to offenses for which no separate fine was permitted to be imposed. (*Ibid.*) The *Watts* court further found that the second paragraph of section 11372.5, subdivision (a) did not apply to a conviction for violating Health and Safety Code section 11378 because although that statute did not provide for a base fine, the offense was subject to a fine pursuant to section 672. (*Watts*, at pp. 235-236.) Therefore, it found controlling the first paragraph's characterization of the crime-lab fee as a fee that was not subject to penalty assessments. (*Id.*, at p. 237.)

We find *Sharret* more persuasive than *Vega* and *Watts* and adopt its conclusion that the fee in Health and Safety Code section 11372.5 is punitive. Although this section refers to the imposition of a "fee," the section reflects the imposition of both a fine and a penalty, especially when considered with other statutes. (Health & Saf. Code, §§ 11372.5, subd. (a), 11502, subd. (a); §§ 1205, 1464.8.) Other courts have found this

fee mandatory and a fine. (See *People v. Taylor* (2004) 118 Cal.App.4th 454, 456 [this fee is mandatory]; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413 [this fee is mandatory and subject to mandatory penalty assessments]; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1522 [the laboratory fee is a fine]; *People v. Clark* (1992) 7 Cal.App.4th 1041, 1050 [this fee is mandatory].) Accordingly, we deem the fee under Health and Safety Code section 11372.5 to be a "punishment." (*Sharret, supra,* 191 Cal.App.4th at p. 870.)

Since Shackelford was convicted of drug offenses in counts 1 and 2, the court should have imposed the laboratory fee pursuant to Health and Safety Code section 11372.5 and any corresponding assessments on each count. However, section 654 prohibited the imposition of additional punishment on count 2 because Shackelford's convictions for transportation of methamphetamine in count 1 and possession of methamphetamine in count 2 were both based on his singular possession of 27.86 grams of methamphetamine. (*Jones, supra,* 54 Cal.4th at p. 358.) Therefore, to comply with section 654's prohibition against multiple punishment, the court should have imposed a laboratory fee and corresponding assessments on each count and stayed the fee and assessments it imposed on count 2. By failing to do so, it imposed an unauthorized sentence that we will direct it to correct.[2]

Further, following an independent review of the record, we find that with the exception of the issues discussed above, no reasonably arguable factual or legal issues exist.

DISPOSITION

The judgment is modified to stay the concurrent two-year term the court imposed on Shackelford's conviction in count 4 for possession of a concealed handgun. The

[2] The court should also have stayed the time it imposed on count 2 but this issue is moot because the court sentenced Shackelford to time served on that count.

judgment is also modified to impose a laboratory fine of $50 and mandatory assessments on counts 1 and 2, and to stay the fee and assessments imposed in count 2. The trial court is directed to file an amended abstract of judgment that incorporates these modifications and to forward certified copies to the appropriate authorities. As modified, the judgment is affirmed.